

Pappalardo v Madison Sq. Garden Co.

2015 NY Slip Op 31859(U)

October 5, 2015

Supreme Court, New York County

Docket Number: 159563/2014

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 35

-----X
 JUDY PAPPALARDO,

Plaintiff,

Index No. 159563/2014

- vs -

Motion Seq. 001

THE MADISON SQUARE GARDEN COMPANY,
 MADISON SQUARE GARDEN, INC., THE BEACON
 THEATRE and MSG NATIONAL PROPERTIES, LLC,
 individually and d/b/a THE BEACON THEATRE,

Defendants.

-----X
 HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendants The Madison Square Garden Company ("MSG Co."), Madison Square Garden, Inc. ("MSG Inc."), The Beacon Theatre ("Beacon Theatre"), MSG National Properties, LLC individually ("National") and d/b/a The Beacon Theatre ("National d/b/a Beacon") (collectively, "defendants") move to dismiss the complaint of Judy Pappalardo ("plaintiff") as to National on the grounds that the complaint was untimely commenced against National (CPLR 3211(a)(5)) and the Court lacks jurisdiction over National (CPLR 3211(a)(8)).

Plaintiff cross moves pursuant to CPLR 306-b to extend her time to serve National, *nunc pro tunc*.¹

Factual Background.²

On October 1, 2011, plaintiff slipped and fell at the Beacon Theatre, located at 2124

¹ Plaintiff cited CPLR 306(b), which pertains to the contents of proof of personal service.

² The factual background is taken in large part from the parties' moving and opposing papers.

Broadway, New York, New York.

Almost three years later, on September 30, 2014, plaintiff commenced this action by filing a Summons with Notice, naming MSG Co., MSG Inc., and Beacon Theatre as defendants. Plaintiff served MSG Co. *via* Secretary of State on January 16, 2015 *and* delivery to “Mr. Goodman” as “Managing Agent,” at 2 Penn Plaza on January 20, 2015. Plaintiff served MSG Inc. *via* delivery to “Mr. Goodman” as “Managing Agent,” at 2 Penn Plaza on January 20, 2015. Plaintiff served Beacon Theatre *via* “suitable service” by delivery to “Scott Shaw” as “Managing Agent” at 2124 Broadway on January 21, 2015.

MSG Co. and MSG Inc. appeared and demanded a complaint.

Plaintiff then filed her Complaint dated March 4, 2015, which named, again, MSG Co., MSG Inc., and Beacon Theatre. In response, an Answer dated April 1, 2015, was filed on behalf of MSG Co. “f/k/a” MSG Inc., *and* “MSG National Properties, LLC, i/s/h/a The Beacon Theatre . . .” (Emphasis added). (According to the movants, National, “the lessee” of the subject premises, interposed such Answer with this “corrected” appearance of MSG National Properties, LLC i/s/h/a The Beacon Theatre as it was “apparent that Plaintiff was attempting to sue the owner and/or tenant at the premises”) (Affirmation in Support, ¶7).

Consequently, plaintiff filed an Amended Complaint, dated April 9, 2015, naming MSG Co., MSG Inc., Beacon Theatre, *and* now, National individually and d/b/a The Beacon Theatre. Such Amended Complaint was served upon National *via* Secretary of State on April 22, 2015. In response, an Answer to the Amended Complaint (dated May 12, 2015) was served on behalf of MSG Co. “f/k/a” MSG Inc., *and* MSG National Properties, LLC (i/s/h/a The Beacon Theatre *and* as MSG National Properties, LLC d/b/a The Beacon Theatre) (hereinafter referred to as ‘MSG’ and ‘National’).” (Emphasis added).

In support of their motion, defendants argue that plaintiff failed to timely commence her action against National. Plaintiff first asserted claims against National in her Amended Complaint, which was filed and served more than six months after the personal injury, three-year statute of limitations expired. Further, the September 30, 2014 Summons filed against Beacon Theatre is insufficient, as misnaming of an entity in a pleading is in fact no naming at all, and thus, such filing cannot constitute the commencement of the action against National.

Even if the filing of the September 30, 2014 Summons is construed as commencing an action against National, the Court lacks jurisdiction over National since plaintiff failed to serve National with such Notice. Specifically, plaintiff's service of the September 30, 2014 Summons does not constitute service upon National because service of the Summons upon Beacon Theatre was made by delivery to Mr. Shaw, and Mr. Shaw was not authorized to accept service upon National. Defendants submit an affidavit from Harold Weidenfeld ("Weidenfeld"), Senior Vice President, Legal and Business Affairs for MSG Holdings, L.P., of which National is a subsidiary. Weidenfeld attests that he "has knowledge regarding which persons or entities are authorized to accept service on behalf of NATIONAL," and that Shaw was not authorized to accept process on behalf of National, which is a limited liability company (Aff. in Support, Exh. J). Furthermore, as National is a foreign limited liability company ("LLC"), delivery to Mr. Shaw as "Managing Agent," is insufficient because a managing agent is not authorized under CPLR 311-a to accept service on behalf of an LLC. That National may have obtained notice of plaintiff's action by means other than proper service of process is irrelevant.

In opposition, plaintiff asserts that the original Summons was timely filed against National by naming it under its assumed name, "The Beacon Theatre." Even if the action was not originally commenced against National under the name for which it answered (the Beacon

Theatre), and National is considered a “new party,” plaintiff’s claims against National are timely based on the relation back doctrine. Plaintiff’s claims against National arise out of the same conduct and occurrence as her claims against MSG Co.; National is united in interest with MSG Co. and thus, National can be charged with notice of the institution of the action and will not be prejudiced in maintaining a defense on the merits; and National knew or should have known that, but for an excusable mistake as to the identity of the proper parties, the action would have been brought against National as well. In addition, National was united in interest with the Beacon Theatre for the same reasons above. Consequently, upon application of the relation back doctrine, jurisdiction over National exists by virtue of plaintiff’s service of the Amended Summons and Complaint upon National by Secretary of State.

In support of its cross-motion to deem service of the Amended Summons and Amended Complaint on National timely, as to the alleged absence of service upon National, plaintiff contends that service of the Summons upon Beacon Theatre was *not* made solely by delivery to Mr. Shaw, who is allegedly unauthorized to accept service upon National; plaintiff served the Summons upon Beacon Theatre *also* on January 23, 2015 by suitable service *via* delivery to Brian “Jones” as Managing Agent at 2 Penn Plaza. And, there is no claim that service upon managing agent Brian was defective, or that the third service upon National *via* the Secretary of State was improper (although beyond the proscribed 120 days).

Plaintiff contends that National appeared in this action by the April 1, 2015 Answer in which it answered as “Defendant . . . MSG National Properties, LLC *i/s/h/a* The Beacon Theatre” and admitted that National is the lessee of The Beacon Theatre. Thus, plaintiff amended its complaint, as of right, to name National individually under its non-assumed name and *d/b/a* The Beacon Theatre, and served National *via* Secretary of State. Such service upon the

Secretary of State should be deemed timely pursuant to CPLR 306-b, *nunc pro tunc*. Plaintiff argues that it is in the interest of justice to extend plaintiff's time to serve National, and plaintiff's delay in serving National was reasonable under the circumstances. MSG Co.'s website identifies the Beacon Theatre as one of its venues, as once a part of MSG, Inc., and as now a part of MSG Co., and the Secretary of State website did not reveal any entity doing business as the Beacon Theatre. And, National admitted in the Answer to the first complaint that it was the defendant "sued herein as" The Beacon Theatre and admitted that it was party against whom the suit was instituted. There is no prejudice to National, which answered the initial Complaint and was aware of the claims at the same time in which MSG Co. became aware of them. Furthermore, it was not until defendants served their Answer to plaintiff's original Complaint that plaintiff first became aware of National's claim that it had been "incorrectly sued herein as" The Beacon Theatre. Likewise, it was only upon receipt of defendants' Answer and subsequent, more detailed motion and supporting affidavit of Weidenfeld that plaintiff became aware that National was questioning the method of service of process on The Beacon Theatre. Thereafter, plaintiff promptly amended her Summons and Complaint to reflect National's "non-assumed name," and served National via the Secretary of State on April 22, 2015, in accordance with CPLR 311-a. Thus, the service of the Amended Summons and Complaint on National should be deemed timely.

In reply, defendants argue that plaintiff is improperly seeking to enlarge the statute of limitations period. Law office failure is not a basis to extend the statute of limitations. Under caselaw, the Court cannot excuse plaintiff's mistake in misnaming National as The Beacon Theater, and the efforts plaintiff made to name the correct entity do not avail the plaintiff. Further, to the extent plaintiff seeks leave to amend her Summons with Notice to name National

based on the relation back doctrine, same should be denied for failure to set forth such request as required under CPLR 2214(a). In any event, plaintiff failed to demonstrate that National was united in interest with MSG Co. (f/k/a MSG Inc.). The mere existence of a parent and subsidiary relationship alone is insufficient to establish that the two companies are united in interest. And, plaintiff concedes that there is no legal entity named "The Beacon Theatre," which is merely the name of the subject premises.

And, plaintiff is not entitled to an enlargement of time to serve National with the Summons with Notice as she failed to demonstrate that she made diligent efforts to effectuate service upon National, and law office failure is not good cause. Due diligence by conducting a last owner search of the online database of the New York City Department of Finance, Office of Register where deeds and other significant documents are filed, would have revealed the owner of the property as "Beacon Broadway Company, LLC" and the tenant as National.³ Service of the Summons with Notice by delivery to Brian "Jones" at 2 Penn Plaza is insufficient to establish service upon National as National is not named in such Summons, a limited liability company such as National cannot be served *via* substituted service, and there is no evidence that "Brian," a purported managing agent, was a member or manager of National, or was otherwise authorized to accept service on its behalf. And, plaintiff failed to establish that the interest of justice warrant an extension of time to serve National, in that she failed to show that her claims against National have merit, she did not diligently request an extension of time to serve National, and the statute of limitations against National expired.

³ The "Recording and Endorsement Cover Page" and "Non-Disturbance Subordination and Attornment Agreement" submitted by defendants do not alter the Court's determination as to the theories concerning a misnamed party or commencement under an assumed name.

Discussion

It is uncontested that plaintiff's original Summons with Notice was filed before the applicable statute of limitations period expired on October 1, 2014, but did not name the movant, "Madison Square Garden National Properties LLC." As such, it cannot be contested that plaintiff timely commenced her action as against MSG Co., MSG Inc., and Beacon Theatre. Thus, the overarching issue is whether plaintiff is barred by the statute of limitations as to commencement of her action against National, and if so, whether the relation back theory brings her claim against National within the statute of limitations.

To be clear, defendants contend that the September 30, 2014 Summons filed against Beacon Theatre cannot constitute the commencement of the action against National in that misnaming of an entity in a pleading is in fact no naming at all; on the otherhand, plaintiff contends that the Summons named National under its "assumed name" "The Beacon Theatre" (even though no certificate of assumed name was filed), because efforts to identify the proper parties revealed MSG Co.'s identity of Beacon Theatre as "part of" MSG Co., and later MSG, Inc. While this Court's research⁴ reveals that pleadings filed against a party under an "assumed" name may implicate CPLR 1024, plaintiff did not cite to this provision, did not address the

⁴ See *Victor Auto Parts, Inc. v. Cava*, [Supreme Court, Monroe County 1990] 148 Misc.2d 349, 560 N.Y.S.2d 269 citing CPLR § 1024 (permitting an amendment of the caption, *nunc pro tunc*, to designate Town and Country Cars, Inc. d/b/a Century Auto Sales, as a respondent in this proceeding, and stating that Century Auto Sales (the assumed name) "is not an independent entity. It is merely the name by which Town and Country chose to conduct its business. The mere creation of another name does not create another entity. The name may distinguish the business, just as an advertising logo does; it does not separate it"); *Tobin v. St. Paul's Lutheran Evangelical Church*, 136 Misc.2d 801, 519 N.Y.S.2d 93 [Supreme Court, New York County 1987] (finding that where plaintiff filed a copy of the summons and complaint and was unaware of the names of either Samuel G. Blakley Tree Company, Inc. and the Almstead Tree Company, and sued "John Doe Tree Company" instead, plaintiff had "available to him the protection of CPLR 1024."

applicability, if any, of this Rule, and did not develop the “assumed name” theory; nor did defendants raise this Rule in response to plaintiff’s argument.⁵

Thus, although this matter does not neatly fit into any framework, the circumstances herein are akin to those found in *Maldonado v Maryland Rail Commuter Serv. Admin.*, 91 N.Y.2d 467695 N.E.2d 700, 672 N.Y.S.2d [1998]), where plaintiff, like the plaintiff herein, incorrectly named a *nonexistent entity* (i.e., The Beacon Theatre) as defendant in the summons.

It is noted that *Maldonado* was decided prior to the enactment of the current, 306-b, and decided under CPLR 306-b(b). In context, former CPLR 306-b had two subdivisions: CPLR 306-b(a) required that proof of service of the summons and complaint be filed within 120 days after the date of such filing, and “If proof of service is not filed and there has been no appearance by the defendant within the time provided in this section for filing proof of service, the action . . . shall be deemed dismissed as to the non-appearing party with respect to whom no proof of service has been filed, without prejudice and without costs.” CPLR 306-b(b) gave a petitioner an additional time following the dismissal in which to start a new action, free of the Statute of Limitations, provided that service upon the defendant is effected within such one hundred twenty day period (see *Winston v. Freshwater Wetlands Appeals Bd.*, 224 A.D.2d 160, 646 N.Y.S.2d 565 [2d Dept 1996]).⁶ In such instance however, the originally dismissed action must have,

⁵ In any event, it does not appear that CPLR 1024 would avail plaintiff under the circumstances, as there is no indication that, assuming she resorted to the “Jane Doe” procedure, she exercised due diligence, *prior to the running of the statute of limitations*, to identify National by name and, despite such efforts, was unable to do so. Any failure to exercise due diligence to ascertain the “Jane Doe’s” name subjects the complaint to dismissal as to that party. It is also questionable as to whether National was described in the Summons with Notice with such form as would fairly apprise National that it was the intended defendant (*Bumpus v. New York City Transit*, 66 A.D.3d 268, 83 N.Y.S.2d 99 [2d Dept 2009]; see also, *Hall v. Rao*, 26 A.D.3d 694, 809 N.Y.S.2d 661 [3d Dept 2006]).

⁶ CPLR 306-b (b) provided, in part, that:

If an action dismissed for failure to file proof of service pursuant to this section or for failure to effect proper service *was timely commenced*, the plaintiff may commence a new action, despite the expiration of

nonetheless, been “timely commenced.” And, the Court of Appeals noted that the “legislative history explaining the remedial reach of CPLR 306-b (b) . . . does not address the . . . situation, when the named defendant *never legally existed*,” which was “the key to the disposition of this case.” (*Id.* 471-472). Consequently, the Court of Appeals concluded that “where, as occurred here, *the misnaming is patently no naming* and no effective service was achieved, the predicate action is not timely commenced as required under CPLR 306-b (b)” (emphasis added) (*see also, Zaleski v. Mlynarkiewicz*, 255 A.D.2d 379, 679 N.Y.S.2d 669 [2d Dept 1998] *citing Maldonado* for the understanding that the “Court of Appeals repeatedly stressed that no effective service was achieved inasmuch as *the named defendant never legally existed*. Thus, *Maldonado* (*supra*) did not involve improper service but, in effect, no service at all.”) (emphasis added).

Likewise, by naming a non-existent entity (The Beacon Theater), plaintiff did not name National, and the original Summons and Notice cannot be considered as a Summons naming National.

Thus, the Amended Complaint, which named Madison Square Garden National Properties LLC for the first time, is untimely as against National unless the relation back doctrine applies (*Anderson v. Montefiore Medical Center*, 41 A.D.3d 105, 837 N.Y.S.2d 98 [1st Dept 2007] (“[o]nce a defendant has shown that the statute of limitations has run, the plaintiff bears the burden of demonstrating the applicability of relation back doctrine”)).⁷

Footnote 6, cont’d.

the statute of limitations after the commencement of the original action, upon the same transaction or occurrence or series of transactions or occurrences within one hundred twenty days of such dismissal *provided that service upon the defendant is effected within such one hundred twenty day period.* (*Bartlett v. Gage*, 166 Misc.2d 317, 633 N.Y.S.2d 246 [Supreme Court, Erie County 1995]).

⁷ CPLR 2214(a), “Notice of motion,” requires that a notice of motion specify “the relief demanded and the grounds therefor.” Plaintiff’s cross-motion does not seek leave to amend the original Summons with Notice, but to

“As codified in New York's Civil Practice Law and Rules, what is commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are ‘united in interest’” (*Buran v. Coupal*, 87 N.Y.2d 173, 661 N.E.2d 978, 638 N.Y.S.2d 405 [1995] citing CPLR 203[b]; see also, CPLR 203 [e] [relation back of new claims against same party]). In order for claims against one defendant to relate back to claims asserted against another, the proponent must establish that “(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is ‘united in interest’ with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.” (*Buran, supra citing Brock v. Bua*, 83 A.D.2d 61, 69, 443 N.Y.S.2d 407 [2d Dept 1981] [citations omitted]).

It is uncontested that the claims against National arise out of same conduct, transaction or occurrence, as the claims against the originally named defendants, MSG Co., MSG Inc., and “The Beacon Theater.” It is also uncontested that National knew or should have known that, but for plaintiff’s mistake as to the identity of the National, the Summons with Notice would have been brought against National as well.

As to the second element, unity of interest means that “the interest of the parties in the

Footnote 7, cont’d.

apply the relation back doctrine to such Summons with Notice such that her Amended Complaint is not deemed untimely.

subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other” (*Zehnick v. Meadowbrook II Associates*, 20 A.D.3d 793, 799 N.Y.S.2d 604 [3d Dept 2005] citing *Quine v. Burkhard Bros.*, 167 A.D.2d 683, 684, 563 N.Y.S.2d 264 [1990], quoting *Prudential Ins. Co. v. Stone*, 270 N.Y. 154, 159, 200 N.E. 679 [1936]). Although the parties might share a multitude of commonalities, including shareholders and officers (see *Mercer v. 203 E. 72nd St. Corp.*, 300 A.D.2d 105, 106, 751 N.Y.S.2d 457 [2002]), “the unity of interest test will not be satisfied unless the parties share precisely the same jural relationship in the action at hand” (*Zehnick v. Meadowbrook II Associates*, *supra*, citing *Capital Dimensions v. Oberman Co.*, 104 A.D.2d 432, 433, 478 N.Y.S.2d 950 [1984] and *Connell v. Hayden*, 83 A.D.2d 30, 42–43, 443 N.Y.S.2d 383 [1981]). Unless the original defendant and new party are “vicariously liable for the acts of the other ... there is no unity of interest between them” (*Mercer v. 203 East 72nd Street Corp.*, 300 A.D.2d 105751 N.Y.S.2d 457 [1st Dept 2002]). And, in order for vicarious liability to exist, “[t]he parent corporation must exercise complete dominion and control [over] the subsidiary’s daily operations” (14 N.Y. Jur 2d, *Business Relationships*, § 41, at 119; see, *Allen v. Oberdorfer Foundries*, 192 A.D.2d 1077, 595 N.Y.S.2d 995).

Here, it cannot be said, as a matter of law at this juncture, that MSG Co. or MSG Inc. does not exercise complete dominion and control over the daily operations of National (*cf.*, *Balderman v. Capital City/Am. Broadcasting Co.*, 233 A.D.2d 861, 862, 649 N.Y.S.2d 284). According to MSG Co.’s Form 10-K, Part I, Item 1. “Business,” and MSG Co.’s Annual Report submitted by plaintiff, MSG Co. reports that National is a subsidiary of MSG Co., and that MSG Co. is a holding company with “direct and indirect subsidiaries through which substantially all of our operations are actually conducted.”

In response, defendants merely argue that plaintiff did not meet her burden, and

submitted no affidavit or other evidence to contradict plaintiff's submission of the K-1 Form or Annual Report. Thus, while defendants correctly point out that under caselaw, the mere existence of a parent-subsidiary corporate relationship is insufficient to establish a unity of interest between the two corporations inasmuch as judgment against one would not necessarily bind the other, defendants submitted no factual support to contradict plaintiff's submissions or show that judgment against one would not necessarily bind the other (*Derso v. Volkswagen of Am.*, 159 A.D.2d 937, 938-939, 552 N.Y.S.2d 1001; *cf. Ward v. Cross County Multiplex Cinemas, Inc.*, 62 A.D.3d 466, 878 N.Y.S.2d 334 [1st Dept 2009] (denying the application of the relation-back doctrine to assert claims against "Quincy" in that the "fact that Quincy is a wholly-owned subsidiary of NAI [the parent], without more, does not demonstrate that they are united in interest"); *Donovan v. All-Weld Products Corp.*, 34 A.D.3d 257 824 N.Y.S.2d 44 [1st Dept 2006] (relation back doctrine applied where "the record establishes that Praxair Distribution is united in interest with Praxair, Inc., of which it is a wholly owned subsidiary, acting as the distributor for Praxair products"; the two entities "necessarily have the same defenses to plaintiff's claim" and will "stand or fall together" in this litigation; "the two companies, intentionally or not, often blurred the distinction between them in that Praxair produced for deposition an employee of Praxair Distribution"); *see, Feszczyszyn v. General Motors Corp.*, 248 A.D.2d 939, 669 N.Y.S.2d 1010 [4th Dept 1998] finding that *proof* submitted by Isuzu America shows that the same directors do not serve on both boards and that Isuzu America is substantially responsible for its own day-to-day operations and the hiring and termination of most of its employees (emphasis added)). (emphasis added)).

Further, although National has admitted it is the lessee of the subject premises, which is alleged to have been negligently maintained (*cf. Connell v. Hayden*, *supra* at 45, 443 N.Y.S.2d

383 [defendants not united in interest when one can avoid liability by placing blame on the other]), it cannot be said, at this juncture, that the interests of National and the defendants named in the Summons with Notice are not identical.

Unlike the cases cited by defendants, in this pre-answer motion to dismiss, discovery has not been conducted as to the relationship between National and MSG Co. Accordingly, dismissal based on the statute of limitations is denied, without prejudice.

As to the alternative argument for dismissal in the event the filing of the Summons with Notice naming Beacon Theater could be construed as commencing an action against National, pursuant to CPLR 3211(a)(8), a party can move to dismiss a cause of action asserted against a defendant on the ground that the Court lacks jurisdiction over the defendant.

CPLR § 311-a. Personal service on limited liability companies, provides:

(a) Service of process on any domestic or foreign limited liability company shall be made by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant.

Defendant's initial papers on their motion challenged the affidavit of service by delivery to Scott Shaw on the ground that, based on Weidenfeld's affidavit, Shaw, "a Director" was not authorized to accept process on behalf of National. Further, defendants cited to *Stuyvesant Fuel Service Corp. v. 99-105 3rd Avenue Realty*, 192 Misc 2d 104 ([Supreme Court, Bronx County 2002]) for the proposition that CPLR 311-a does not authorize personal service upon an alleged "managing agent." Here, Weidenfeld's affidavit is sufficient to defeat the claim that Shaw was authorized to accept service for National (*see Stuyvesant Fuel Service Corp. v. 99-105 3rd*

Avenue, supra (“While the affidavits of the Cromans do not specifically state that ‘Jane Smith’ is not a member or manager of the LLC as defined in the Limited Liability Companies Law, said affidavits contain sufficient information and statements to infer that “Jane Smith” (a possible a receptionist for several businesses unrelated to the defendants) is not a member or manager of the LLC.”)). However, the same cannot be said as to plaintiff’s second affidavit of service attesting that service of process was delivered to Brian “Jones” as “Managing Agent.” In response to plaintiff’s submission of this second affidavit of service, unlike defendant’s moving papers, defendants’ response merely states that there is no evidence that Brian “Jones” is a member or manager or that he is authorized to accept service for National. Defendants submitted “no affidavit by a person having knowledge of the facts has been submitted to refute the claim that” Brian “Jones” “is the Managing Agent authorized to accept service” for National (*see 126 Spruce Street, LLC v. Club Cent., LLC*, 830 N.Y.S.2d 506, 15 Misc.3d 538 [N.Y. Dist.Ct. 2007] distinguishing *Stuyvesant Fuel Service Corp., supra* where the affidavit of service, stating that “Cara Roberts” was the “Managing Agent of the Corporation and authorized to accept service,” fit under the third and fourth categories of CPLR 311-a where “no affidavit by a person having knowledge of the facts has been submitted to refute the claim that Cara Roberts is the Managing Agent authorized to accept service.”)). Service of process by delivery to an LLC’s “Managing Agent” was sufficient “proof” that service was made upon a person authorized to accept service pursuant to CPLR § 311-a. (see also, affidavit of service of Mr. Birmingham with respect to defendant Huron constitutes prima facie evidence of proper service of process upon defendant Huron pursuant to CPLR 311-a(a) where service was made by delivery to “Anna Koutsouladakis,” as the managing agent authorized to accept service on behalf of defendant Huron”; where defendants raised no issue of fact rebutting this affidavit of

service, in that they failed to claim that defendant Huron has no authorized or designated agent or person to receive service, or that Ms. Koutsouladakis was neither a member nor a manager of defendant Huron, a traverse hearing was unnecessary)). In light of plaintiff's affidavit that Brian "Jones" was the Managing Agent authorized to accept service, and in the absence of an affidavit indicating that Brian "Jones" was not "authorized by appointment to receive process (CPLR 311-a (iii)), or not "designated by the limited liability company to receive process," (CPLR 311-a (iv)), dismissal is unwarranted, at this juncture.

As relevant herein, CPLR 311-a (a) provides that service upon a limited liability company be made:

"by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. Service of process upon a limited liability company may also be made pursuant to article three of the limited liability company law [on the Secretary of State]."

If such service is not made within 120 days after the filing of the Summons and Complaint, the Court, upon motion, "shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (CPLR 306-b). It is "well settled that the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made" (*Persaud v Teaneck Nursing Center, Inc.*, 290 AD2d 350, 351 [1st Dept 2002], citing *McCray v Petrini*, 212 AD2d 676 [2d Dept 1995], *lv denied*, 81 NY2d 707 [1993]; see also *Saratoga Harness Racing Assn. v Moss*, 20 NY2d 733, 283 NYS2d 55 [1967]; *Jacobs v Zurich Ins. Co.*, 53 AD2d 524, 384 NYS2d 452 [1st Dept 1976]). According to the First Department, a "proper affidavit of a process server attesting

to personal delivery upon a defendant constitutes *prima facie* evidence of proper service” (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 AD3d 459, 460, 2004 NY Slip Op. 04234 [1st Dept 2004]). To defeat this *prima facie* showing, a defendant must provide a “sworn, nonconclusory denial of service” requiring a traverse hearing (*id.*).

Defendants argue that plaintiff incorrectly named The Beacon Theatre, a nonexistent entity, as defendant in the original summons and complaint and never effected proper service of the original initiatory papers on the intended defendant, National, within the applicable three-year statute of limitations. Hence, service of the original summons and complaint is defective as to National, as “[t]he misnaming of the . . . entity was in fact no naming at all” (*Ross v Lan Chile Airlines*, 14 AD3d 602, 603 [2d Dept 2005], citing *Maldonado v Maryland Rail Commuter Serv. Admin.*, 91 NY2d 467, 472 [1998]; see also *Levine v Pita Grill II*, 69 AD3d 496 [1st Dept 2010] [although defendant waived any limitations defense, court noted service was not valid where plaintiff incorrectly named a nonexistent entity as defendant in the original summons and complaint, and never effected proper service on the intended defendant within the applicable statute of limitations period]). As such, dismissal based on lack of personal jurisdiction is denied, without prejudice.

Conclusion

Based on the foregoing, it is hereby

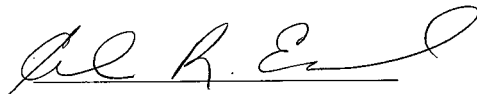
ORDERED that the motion to dismiss plaintiff’s complaint on the grounds that the complaint was untimely commenced against MSG National Properties, LLC individually and d/b/a The Beacon Theatre (CPLR 3211(a)(5)) and the Court lacks jurisdiction over MSG National Properties, LLC individually and d/b/a The Beacon Theatre (CPLR 3211(a)(8)) is denied, without prejudice; and it is further

ORDERED that the parties shall appear for a preliminary conference on November 17, 2015, 2:15 p.m.; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 5, 2015

A handwritten signature in black ink, appearing to read 'Carol Robinson Edmead', written over a horizontal line.

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMED